then say that foreclosing a $250 million claim of the United States "breaks no new ground," Opp. at 21, is implausible.[7]

Nor are respondents correct that *United States v. Beebe*, 127 U.S. 338 (1888) – a non-Indian case applying laches to a dispute between two private parties over a United States land patent in which the United States was joined as a nominal party – supports the application of laches against the United States here. This Court in *United States v. Minnesota*, 270 U.S. 181 (1926), squarely rejected application of *Beebe* when the United States sues on behalf of Tribes, even if it does so in part to overcome a jurisdictional bar. *See id.* at 194-95. The Court held that the United States is not a nominal party, but instead has a "real and direct interest" that "arises out of its guardianship over the Indians." *Id.* at 194; *see also Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 657 n.1 (1979) (suits on behalf of tribes implicate United States' "governmental rights" and "sovereign" interests); *see also* U.S. Pet. at 7 (United States sued both pursuant to its "trust relationship with the Cayugas" and "on its own behalf").

5. Finally, respondents do not dispute that this case is an ideal vehicle for addressing the question presented. The district court resolved all outstanding issues on liability, and it conducted two full trials – a jury trial on damages and a bench trial on pre-judgment interest in which the court made exhaustive findings. There are no contested facts for this Court to resolve, and the legal issues – which are undeniably important – are squarely presented.

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[7] The best respondents can manage is dicta stating that equitable estoppel "might" be available, *see Heckler v. Community Health Servs. of Crawford County, Inc.*, 467 U.S. 51, 60-61 (1984), and that laches might in some cases limit the ability of the EEOC to obtain full equitable relief for a private plaintiff, *see Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 373 (1977). Neither case actually applied laches to the United States, and thus neither supports the Second Circuit's decision here.

That said, lest respondents' rendition of the facts leave a false impression, it is important to set the record straight. First, despite the suggestion implicit in respondents' statement of the case, Opp. at 3-6, the district court found that the transactions at issue here violated the Nonintercourse Act (as has every court to review New York's actions), and the Second Circuit did not disturb that holding.

Second, the State contends that the price paid the Cayugas was fair. The district court found, however, that the terms of the State's 1795 Act were "patently disadvantageous to the Indian's best interests," and that "the State cannot be said to have acted in good faith with respect to the Cayuga when it forged ahead with the 1795 Act, putting its own financial gain above all else." Pet. App. 168a-69a.

Third, although the State seeks to convey the impression that the Tribes somehow sat on their rights, the district court expressly found otherwise, noting that "the record contains considerable proof as to the Cayuga's efforts, beginning in 1853 and continuing right up until filing this lawsuit." Pet. App. 212a; *see also id.* 219a ("The court cannot find that the Cayuga are responsible for any delay in bringing this action."). And the State does not contest that no judicial forum was open to the tribes throughout the relevant period. *See* Amicus Br. of Onondaga Nation *et al.* at 12-17.

Finally, although the State neglects to mention it, in its damages award the district court accounted for both the minimal annuities and payments that the State has provided over the years, and for the alleged failure of the United States to protect the Tribes, in the latter case reducing the amount of prejudgment interest damages by 60%. Pet. App. 236a-237a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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Nos. 05-982 and 05-978

In The Supreme Court of the United States

CAYUGA INDIAN NATION OF NEW YORK, *et al.*,

Petitioners,

v.

GEORGE E. PATAKI, GOVERNOR OF NEW YORK, *et al.*,

Respondents.

UNITED STATES,

Petitioner,

v.

GEORGE E. PATAKI, GOVERNOR OF NEW YORK, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL CONGRESS OF AMERICAN INDIANS IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

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INTEREST OF *AMICUS CURIAE*[1]

Established in 1944, the National Congress of American Indians ("NCAI") is the oldest and largest American Indian organization, representing more than 250 Indian tribes and Alaska Native villages. NCAI is dedicated to protecting the rights and improving the welfare of American Indians. As shown below, this case calls for the straight-forward application of settled principles of law – that Indian tribes, and the United States as their trustee, may sue and obtain money damages for the violation of a tribe's long-standing rights protected by federal law. The contrary decision of the U.S. Court of Appeals for the Second Circuit would deny Indian tribes any relief for such violations on the premise that vindication of their rights through money damages would significantly disrupt settled expectations. This unprecedented ruling threatens to not only extinguish all tribal land claims within the Second Circuit, but will be argued to mean that the substantive rights of Indian tribes to their lands and resources are entirely unenforceable even through money damages. This legally unsupportable result would be disastrous to Indian tribes across the country.

REASONS FOR GRANTING THE PETITION

The Second Circuit has adopted a dangerous standard by which claims brought by Indian tribes to vindicate their

[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the prepartion and submission of this brief.

rights secured by treaties and protected by federal law will now be judged. According to the court of appeals, equitable defenses, including laches, impossibility and acquiescence, can be applied to bar "disruptive" claims brought by Indian tribes, even when those claims seek only monetary damages. *Cayuga Indian Nation of New York v. Pataki*, 413 F.3d 266, 277 (2d Cir. 2005). According to the Second Circuit, such claims are "subject to dismissal *ab initio*." *Id.* at 278.

The notion that a monetary damages remedy can be the type of "disruptive" relief that results in Indian claims being barred *ab initio* flies in the face of settled precedent. Thus, the question presented by petitioners – whether equitable considerations can entirely bar a claim by an Indian tribe, and by the United States as trustee for the tribe, for monetary damages as compensation for the unlawful acquisition of tribal lands in violation of federal law – is of exceptional importance, having broader legal and practical implications outside the context of the New York land claims litigation. This Court, rather than a sharply divided panel of the Second Circuit, should decide this question of substantial importance to Indian tribes across the country.

1. Review Is Warranted Based on the Broad Legal and Practical Implications of the Second Circuit's Decision Outside the Context of the New York Land Claims Litigation.

In *City of Sherrill v. Oneida Indian Nation of New York*, 125 S.Ct. 1478, 1494 (2005), this Court reaffirmed its holding in *County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226 (1985) ("*Oneida II*"), that "the Oneidas could maintain a federal common-law claim for damages for ancient wrongdoing" – the unlawful taking of tribal lands by the State of New York in 1795 in violation

of the Non-Intercourse Act (25 U.S.C. § 177). 125 S.Ct. at 1483. Amicus agrees with petitioners that the Second Circuit's decision eviscerates *Oneida II* and wholly ignores the rationale of *Sherrill*, which focused on the disruptiveness of the remedy rather than the vitality of the claim.

Contrary to *Oneida II* and *Sherrill*, the Second Circuit expansively and incorrectly interpreted *Sherrill* to establish a broad rule that equitable defenses can bar all Indian *claims* as too "disruptive" regardless of the remedy sought:

> Although we recognize that the Supreme Court did not identify a formal standard for assessing when these equitable defenses apply, the broadness of the Supreme Court's statements indicates to us that *Sherrill's* holding is not narrowly limited to claims identical to that brought by the Oneidas, seeking a revival of sovereignty, but rather, that these equitable defenses apply to "disruptive" Indian land claims more generally.

413 F.3d at 274. However, the prospect of disrupting the *status quo* based on the long-standing denial of tribal rights has never been a basis for leaving an Indian tribe with absolutely no remedy for the vindication of those rights. Outside of Indian law, the Court has consistently rejected the argument that monetary remedies – even those hundreds of times larger than the amounts at issue here – should be barred because they are disruptive or otherwise too big. *See e.g.*, *United States v. Winstar Corp.*, 516 U.S. 1087 (1996) (savings and loan litigation); and *Norfolk & Western Railway Co. v. Ayers*, 538 U.S. 135 (2003) (asbestos litigation). There is no reason to treat Indian claims in a uniquely harsh manner.

This Court has recognized that monetary relief can and should be available when the alternative remedy is for

some reason unavailable or inappropriate. In *Yankton Sioux Tribe v. United States,* 272 U.S. 351, 358 (1926), this Court considered the proper remedy available to a tribe when its lands have been taken illegally and found that if ejectment is impossible, then "in accordance with ordinary conceptions of fairness" the tribe is entitled to monetary compensation. The Court reached a similar result in *Felix v. Patrick,* 145 U.S. 317, 334 (1892) (justice requires payment for original value of land even though other considerations weigh against returning land to Indian possession). In addition to precluding the unjust "no remedy" outcome, both *Yankton Sioux* and *Felix v. Patrick* make clear that monetary damages are generally the least disruptive remedy. To apply *Sherrill* to preclude monetary damages (as the Second Circuit did) is clearly wrong.

Further, this Court has never suggested that a claim for damages is not viable because it would be too "disruptive." In fact, this Court rejected this argument in *Oneida II.* In *Oneida Indian Nation v. New York,* 691 F.2d 1070, 1082 (2d Cir. 1982), the Second Circuit considered an argument that the land claims were not justiciable because "an appropriate judicial remedy cannot be molded." The court of appeals rejected that argument, concluding,

> [A]s the Supreme Court held in *Yankton Sioux Tribe v. United States*, 272 U.S. 351, 47 S.Ct. 142, 71 L.Ed. 294 (1926), if the ejectment of current occupants and the repossession by the Indians of a wrongfully taken land is deemed an 'impossible' remedy . . . the court has authority to award monetary relief for the wrongful deprivation.***The defendants point to the scale of the wrong alleged and the size of the remedy sought as rendering the claims nonjusticiable. . . . [W]e know of no principle of law that would relate the

> availability of judicial relief inversely to the gravity of the wrong sought to be redressed. Rather, the courts have in numerous contexts treated as justiciable claims that resulted in wide-ranging and 'disruptive' remedies.

Oneida, 691 F.2d at 1083.

The State and counties raised this same argument again in *Oneida Indian Nation v. Oneida County*, 719 F.2d 525, 539 (2d Cir. 1983) when they charged that the district court's holding of liability "will have catastrophic ramifications" and therefore deemed the claim non-justiciable. The court of appeals reiterated its view that "[t]o our knowledge no Indian claim has ever been dismissed on non-justiciability grounds." *Id.* at 539 (citing *Oneida*, 691 F.2d at 1081). On appeal to the Supreme Court in *Oneida II*, the State argued in its brief that "chaos" would result from a judicial resolution of the claims. 1984 WL 566152, p. 29. Thus, the potentially disruptive nature of the claims was presented to this Court in *Oneida II*. Even so, the Court was not persuaded. Thus, this Court in *Oneida II* declined to overturn the Second Circuit's holding that the claims for money damages were justiciable, and it affirmed liability and the award of damages in the "test case" presented there. 470 U.S. at 253, n.27.

This Court's implicit rejection of disruption as a test for the validity of Indian claims for money damages was correct and is reflected in many of this Court's own decisions that have recognized the rights of Indians to what non-Indians may deem a disruptive remedy. In *Arizona v. California*, 373 U.S. 546, 595-601 (1963), in a contentious dispute between seven states over rights to the waters of the Colorado River, this Court affirmed the *Winters* doctrine reserving tribal water rights with a priority date as

of the time the Indian reservation was established and in an amount sufficient to satisfy the present and future needs of the Indian tribe. In *Washington v. Washington State Commerical Passenger Fishing Vessel Ass'n,* 443 U.S. 658, 668-69 & n.14, 676-77 & n.22, 685-87 (1979), this Court, over the strong opposition of the State of Washington and contrary to "settled expectations" of the non-Indian commercial fisheries, upheld the tribal treaty fishing right to harvest up to 50 percent of the total fish runs despite present-day domination by non-Indian commercial fisheries and the long-standing exclusion of Indian participation in fisheries under state law. *See also United States v. John,* 437 U.S. 634, 652-54 (1978) ("the long lapse in the federal recognition of tribal organization," and significant periods of unchallenged assertions of state jurisdiction over Indians and Indian lands, does not authorize a state to exercise criminal jurisdiction over Indians contrary to federal law); and *Minnesota v. Mille Lacs Band of Chippewa Indians,* 526 U.S. 172, 204-08 (1999) (affirming Indian treaty hunting, fishing and gathering rights on ceded lands within the state and finding that such tribal rights "are not inconsistent with state sovereignty over natural resources").

Indeed, if "disruption" becomes a basis for destroying tribal treaty rights in their entirety, as distinguished from being a factor considered in limiting the relief available, countless rights of Indian tribes will be in jeopardy. Defendants in tribal rights cases will assert laches as a defense to all relief – including monetary relief – for substantive claims involving Indian lands; water rights; treaty fishing; hunting and gathering rights; allocation of natural resources; and jurisdictional disputes. The fact that the vindication of tribal rights secured by treaties and

protected under federal law, but ignored or trampled on by state governments, may result in the "disruption" of the settled expectations of non-Indians is no justification for denying relief altogether.

2. Review Is Appropriate Because the Second Circuit's Decision May Eliminate Any Potential for Negotiated Resolution of Disputes Between States and Indian Tribes.

This Court has long recognized the importance of resolving disputes between states and Indian tribes on a government-to-government basis. *See Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma,* 498 U.S. 505 (1991) (state-tribal tax agreements as an alternative in lieu of litigation); *Nevada v. Hicks,* 533 U.S. 353, 393 (2001) (O'Connor, J., concurring) (encouraging intergovernmental cooperative agreements for resolution of complex questions of law).

There can be no doubt that many Indian claims, including Indian land claims, present difficult issues whose resolution will have far-reaching implications for Indian tribes and their members, as well as for non-Indian communities and their citizens. Both sides believe they are aggrieved. That is why many who have confronted these issues agree that the best solution is for the parties to come to a negotiated settlement of the dispute. Negotiated settlement is the preferred solution because it gives the parties an opportunity to work cooperatively to fully address the myriad of issues that inevitably flow from these disputes – jurisdiction, boundaries, land ownership, and adequate compensation.

Other states, faced with illegal land transactions such as those at issue here, have almost uniformly sought to resolve those claims by settlement. Moreover, Congress has consistently encouraged and endorsed negotiated settlement of Indian claims. For example, when considering the extension of 28 U.S.C. § 2415, Congress recognized the ongoing efforts of the parties to resolve their disputes through negotiated settlements.[2] Congress has enacted numerous laws to implement negotiated land claim settlements between Indian tribes and states, from Maine to California.[3] Negotiated resolution has worked everywhere but New York.[4]

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[2] 123 CONG. REC. 22,166 (1977) (statement of Rep. Emery) ("Indian claim extension is critical to the careful and equitable resolution of the problem."); 126 CONG. REC. 3288 (1980) (statement of Rep. Cohen) ("[Maine] would like to see an extension of the statute of limitations in order to allow the parties to continue to try to work out a settlement. . . ."); S. REP. NO. 96-569, at 9 (1980) (statement of Forrest Gerard, Asst. Secretary for Indian Affairs, Dept. of the Interior) ("We have been attempting to achieve negotiated settlements in a number of these claims. . . ."); H.R. REP. No. 96-807, at 9 (1980), *reprinted in* 1980 U.S.C.C.A.N. 206, 213 ("We believe, in view of the serious nature of this situation, that we must negotiate fair and honorable compromises for presentation to the Congress and that, in the absence of such compromises, we must be prepared to recommend appropriate legislative solutions.")

[3] Rhode Island Indian Claims Settlement Act, 25 U.S.C. §§ 1701-1716; Maine Indian Claims Settlement Act, 25 U.S.C. §§ 1721-1735; Florida Indian Land Claims Settlement Acts, 25 U.S.C. §§ 1741-1750e and 1772-1772g; Connecticut Indian Land Claims Settlement Act, 25 U.S.C. §§ 1751-1760; Massachusetts Indian Land Claims Settlement Act, 25 U.S.C. §§ 1771-1771i; Washington Indian Land Claims Settlement Act, 25 U.S.C. §§ 1773-1773j; Mohegan Nation Land Claims Settlement Act, 25 U.S.C. §§ 1775-1775h; Santo Domingo Pueblo Land Claims Settlement Act, 25 U.S.C. §§ 1777-1777e; Torres-Martinez Desert Cahuilla Indians Claims Settlement Act, 25 U.S.C. §§ 1778-1778h;

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